PROPERTY IN CHATTELS

I

PROPERTY IN THE TRESPASSER

IS it true that the common law ever thought of a trespass as conferring the absolute property in the chattel on the trespasser? [1] No such result would have followed from the application of disseisin to chattels, for the doctrine of ownership which Professor Ames treats under that head is admittedly a doctrine of divided ownership with the right to possession in the disseisee and the present enjoyment and right of alienation in the disseisor.[2] It is only by combining disseisin with the fact that trespass was not an action for the specific recovery of property and limiting the disseisee's remedy to the action of trespass that any such result is reached.[3] Nowhere in the books is to be found any intimation of such absolute change of property by a trespass, and it is so counter to fundamental notions that not only have prevailed from the later Middle Ages to our own time, but seem to have been just as fundamental in the earlier law of which Pollock and Maitland treat,[4] that the burden of proof is heavy on him who would establish it even for a time.

It is not until the reign of Edward III that we find the "property" in a chattel ascribed to a trespasser or thief.[5] If at that time there was a right to the specific recovery of chattels taken by way of trespass as there was admittedly of chattels taken by way of theft, the notion that this "property" of the trespasser was an absolute property must fall. "Our common law . . . seems to have started in the twelfth and thirteenth centuries with a stringent prohibition of informal self help," [6] and Britton supposes a case

[1] Ames, "Disseisin of Chattels," 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 549.

[2] *Ibid.*, 543.

[3] *Ibid.*, 549.

[4] 2 HISTORY OF ENGLISH LAW, 2 ed., 168 n. 2.

[5] AMES, 3 SELECT ESSAYS, 542.

[6] 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 169.

where on an appeal for stealing a horse, the appellee proves the horse his own and thus escapes the gallows but loses his horse because he has had recourse to force rather than to judgment.[7] In 18 Edward III, however, a plaintiff in trespass urges that "even though the mine was dug in his [the defendant's] freehold, as he says, nevertheless through our having the lead in our hands the property in it came to us, in which case he could not lawfully take it away from us, but would be put to his action." [8] But the point is not allowed. Proprietary pleas were not allowed in trespass, but it seems doubtful whether even from the first a jury in such a case would have found there had been a taking of the goods of the plaintiff.

What Maitland says as to real property that by the death of Edward III the common law seems to have taken its final form, that in general possession was not protected against ownership,[9] seems to have been as true in the case of chattels as in the case of land. It is said that it was during the fourteenth, fifteenth, and sixteenth centuries that the right of self-redress received its greatest expansion.[10] Littleton tells us that descent did not cut off a right of entry to a chattel real,[11] and this has been applied also to goods.[12]

Nor is it at all certain that there was not a right of specific recovery in the greater number of cases of trespass through the action for a *chose adirrée* in the local courts.[13] It was the civil action that corresponded to the action for a theft [14] and the limitation of actions of trespass in the King's courts to cases where the chattel was worth forty shillings must have made the relief in the local courts in cases of trespass all important.[15]

Until within the last century [16] the law as to the specific recovery of chattels seems to have been much the same as it was in the

---

[7] 1 NICH. BRITT. 115, 116, cited 2 P. & M., 2 ed., 168.

[8] Y. B. 17 & 18 EDW. III (R. S.) 628.

[9] 4 LAW QUART. REV. 289.

[10] 28 LAW QUART. REV. 266.

[11] CO. LITT. 249 *a*.

[12] COM. DIG. BIENS (E).

[13] Professor Ames thinks on the whole that there was not. "History of Trover," 3 SELECT ESSAYS, 438.

[14] 2 P. & M., 2 ed., 161. There was some doubt as to whether it lay in case of a wrongful taking, 161 n. 4.

[15] See 2 P. & M., 2 ed., 150.

[16] *Ibid.*, 154.

early years of Edward III. If anything the chances of specific recovery had been lessened, for although in detinue one was not sure of recovering the property, as the defendant had his option of returning the property or paying its value, still there was more probability of the return of the chattel than in trover, and trover had largely superseded detinue until it was revived by the Common Law Procedure Act of 1854, giving the successful plaintiff a definite right to the property.[17] Replevin in practice was still usually confined to cases of distress and there was a question in 1856 as to whether it lay in any other case.[18]

As far as specific recovery is concerned, there would probably be as much ground for arguing that in 1800 a trespass effected an absolute change of property in a chattel as in 1326. But if anyone in 1800 had asked a lawyer whether a trespasser gained the absolute property in the chattel by his tort, there is little doubt that he would have responded in the negative just as had the judges of the 1400's,[19] and their proof would have been his proof that replevin lay in such a case. This concurrence of replevin with trespass would have been largely if not quite theoretical. But while Professor Ames, it would seem correctly, traces this theoretical concurrence back as far as the institution of the writ *de proprietate probanda* [20] which allowed of the continuance of replevin proceedings if property were found in the plaintiff, notwithstanding a claim of property by the defendant, he would seem to have been in error in placing the institution of that writ in the reign of Edward III rather than in that of his predecessor.[21] He doubted [22] the correctness of the reference to it as of 2 Edward III, Iter North,[23] on the ground that Stonore and Shardelowe, to whom apparently reference is made, were not then judges, but Stonore was apparently at that time a judge of the Common Pleas,[24] and Shardelowe, although not yet raised to the Bench, may well have been on circuit, and there is an express reference to the writ in 19 Edward II.[25] The reference in the Abbrevatio Placitorum [26] to an attachment proceeding for a

[17] MAITLAND, EQUITY, 365.
[18] Mennie *v.* Blake, 6 E. & B. 842 (1856).
[19] See *infra*, pp. 385–6.
[20] 3 SELECT ESSAYS, 553.
[21] *Ibid.*, 552.
[22] LECTURES ON LEGAL HISTORY, 68 n. 5.
[23] FITZ. ABR., PROP. PROB. 4.
[24] See FOSS, BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND.
[25] FITZ. ABR. REP. 26.
[26] 18 EDW. II, Ab. Pl. 348–349, rot. 17, quoted in AMES, LECTURES, 67.

false claim of property in replevin would rather confirm this than otherwise, for such a proceeding is expressly provided for in the writ.[27] That theoretical concurrence was not accompanied by concurrence in practice would indicate that the demand for specific relief was not great. But what Professor Ames said as to absolute property in the trespasser was *obiter*. His main thesis was disseisin.

Lord Esher, in 1891,[28] expressed the opinion that the property in chattels is not changed by the running of the Statute of Limitations. If this be so, the law of adverse possession with regard to land is of little help to us in the law of chattels and a rich field of analogy is lost. Lord Esher's opinion, however, was given without the benefit of Professor Ames' work,[29] and it does not seem likely that it will be followed; but the evident assumption on which he was proceeding — that disseisin had been peculiar to land — may cause us to question how far those ideas which are peculiarly associated with disseisin, as distinguished from adverse possession, found expression in the law of chattels.

The difference between the old disseisin and the modern adverse possession may be brought out by an analogy from the law of nations. In the old books, a belligerent who had seized the territory of his enemy might call it "his" even during the continuance of military operations. By right of conquest the inhabitants now owed him allegiance and might be compelled to serve in his armies.[30] Thus prior to the Napoleonic wars, territory seized by the French armies and the inhabitants thereof became French by the fact of seizure.[31] The effects of conquest, however, were profoundly modified by the doctrine of *postliminium* or *postliminy*, by which on the retaking of the territory title revested in the old sovereign as from the beginning, the old allegiance was restored and transfers of land made in the meantime invalidated. The doctrine of *postliminy* did not in general apply to movables. To-day conquest has been relegated to a subordinate place in treatises on international law and military occupation has taken the place of importance once held by it. No longer may the inhabitants of occupied territory

[27] REG. BREV. 85.

[28] Miller *v.* Dell, L. R. [1891] 1 Q. B. 468.

[29] 3 SELECT ESSAYS, 571.

[30] See, for instance, MARTENS, SUMMARY OF THE LAW OF NATIONS, Bk. VIII, Ch. III, § 8.

[31] See POTHIER, TRAITÉ DES PERSONNES, Title II, § 1.

be compelled to take the oath of allegiance to the occupant, nor be compelled to serve in his armies. The occupant's rights are of a temporary, provisional nature and do not extend to the alienation of land.

It is the same distinction, it is believed, that marks the difference between the old disseisin and the modern adverse possession. The old disseisin was a doctrine of change of title which might be revested as from the beginning by the reëntry of the disseisee.[32] The modern adverse possession is a doctrine of inchoate title which may ripen into perfect title by the lapse of time. Old notions of conquest were contrary to the morality of the time as preached by Rousseau and others and failed to satisfy juristic conceptions of the distinction between ownership and possession. No such crusade as that of Rousseau was directed against disseisin, but its inadequacy to satisfy present moral and juristic conceptions is evidenced by the desuetude into which it has fallen. Much, however, that was law under the old conquest is still law under military occupation, and also much that was law under disseisin holds good under adverse possession. In many cases the result has been merely a change of emphasis.

There is much probability that livery of seisin was once as essential to the transfer of title to chattels as it was of title to land.[33] If this was so, it must have been impossible for one to transfer the property in chattels in the adverse possession of another. But there was less occasion to pass on this question in the case of chattels than there was in the case of land, and how little that occasion was may be gathered from the very scanty evidence either way which Professor Ames was able to find in the Year Books.[34] What evidence there is from the 1400's is rather against the non-assignability of such property than for it,[35] but already in the 1400's it had become possible to transfer chattels by deed [36] or sale [37] without delivery, and it is possible that the views expressed then marked

[32] The analogy between this and *postliminy* has been noticed by common-law writers. See 3 BL. COM., Ch. 12, 210; STEARNS, REAL ACTIONS, 410.

[33] 2 P. & M., 2 ed., 180.

[34] See "Disseisin of Chattels," 3 SELECT ESSAYS, 555–560.

[35] Danby, C. J., Needham and Vavasor were against it, while Brian, C. J., was for it. Littleton, as counsel, was for it but was overruled. See *infra*, pp. 385–6.

[36] See the cases cited in Cochrane *v.* Moore, L. R. 25 Q. B. D. 57 (1890).

[37] See BLACKBURN, SALE, 283 *et seq.* But see also Maitland, "Mystery of Seisin," 3 SELECT ESSAYS, 610 n.

a departure from earlier ideas. In Fitzherbert [38] is cited a case from the time of Edward III which, if correctly reported, would support this view. But the suspension of the disseisee's right of alienation in the case of land would probably not have been thought of as divesting his property or right of property [39] and no such result would necessarily have followed a suspension of the right of alienation in the case of chattels.

Nor would any common lawyer probably have thought of a disseisin as working a change of "property" in land. In striking contrast with the possessory actions such as the assize of novel disseisin was the proprietary writ of right. In so far as "property" was thought of in connection with land it must have been generally identified with the best right which was the foundation of the writ of right rather than with the seisin of free tenement which was the disseisor's.[40] But the doctrine of estates did not apply to chattels, and if disseisin was to be applied to chattels at all, it is hard to see what terms could have been found to express the nature of the rights of the disseisor and disseisee other than those used by Brian, C. J. — "property" and "right of property." [41] This ascription of "property" to the disseisor and the denial of it to the disseisee must have seemed the less strained from the fact that property then as now was commonly used to indicate the thing which was the subject of the right as well as the right itself. Brian, however, was not using "property" to indicate the *res*, and he had to argue that his "property" and "right of property" were not the same thing, and although he found support for this usage of terms in the cases cited by Professor Ames from the time of Edward III,[42] this usage apparently seemed as strange to most of the judges of the 1400's as it does to us.[43] "Property" to them meant "right of property," something akin at least to our ownership, and this they were unwilling to ascribe to the trespasser. Disseisin of chattels might have had a better chance had it not been for the unfortunate language in which it was clothed.

"Property" seems to have been ascribed to a thief even earlier

[38] ABR. REP. 43, trans. by Prof. Ames, 3 SELECT ESSAYS, 559. Query as to whether the last sentence in Prof. Ames' translation was in the original report or was an addition of Fitzherbert. For a similar case, see *infra*, p. 393–4.

[39] See following paragraph.

[40] See 2 P. & M., 2 ed., 78, 153 n.

[41] Y. B. 6 HEN. VII, 9–4.

[42] 3 SELECT ESSAYS, 544.

[43] *Infra*, pp. 385–6.

than to a trespasser.[44] Professor Ames' statement of the case is as follows:

"*John* v. *Adam* was a case of replevin in the *detinet* for sheep. Avowry that the sheep were stolen from the plaintiff by M., who was driving them through the defendant's hundred; that M., to avoid arrest, fled to the church and abjured the realm, and so the defendant was seised by virtue of his franchise to have the goods of felons. Certain formal objections were taken to the avowry, to which Herle, C. J., answered: 'Whatever his avowry be, you shall take nothing; for he has acknowledged that the property was once in you, and afterward in him who stole them; and now he affirms the property in himself, and therefore, although he cannot maintain the property in himself for the reason alleged, still you shall not have the sheep again, for he gives a mesne; namely, the felon in whom the property was.' " [45]

The case is not, however, an authority for the statement that "the goods, having become by the theft the property of the felon, were forfeited as a matter of course with the rest of his chattels." [46] Herle, C. J., said that it would be "hard law" if it were so; to which it was replied that "it is coroner's law that he, whose goods were taken, shall not have them back unless the felon be attainted at his suit." [47]

The case is interesting as an attempt to use replevin in a case of theft and that as against one holding subsequently to the thief. But it is unfortunate that felony was involved. Otherwise despite its procedural handicap, replevin might have developed into an effective remedy against the third hand. Its recuperatory character gave it an advantage in this respect over trespass. As it was, however, the fact that the action was brought against one subsequent to the wrongdoer was fatal. Disseisin offered a ready explanation for denying the plaintiff recovery. The beasts were not "his" at the time of the taking by the defendant.

In the following century the same point was made against allowing an appeal of felony against a second thief.[48] The argument evidently was that after the first theft the appellor could no

[44] Y. B. 8 EDW. III, 10–30.

[45] 3 SELECT ESSAYS, 542.

[46] *Ibid.*, 543.

[47] Trans. Ames, "History of Trover," 3 SELECT ESSAYS, 421. See 2 P. & M., 2 ed., 165.

[48] Y. B. 13 EDW. IV, 3-7.

longer call the stolen goods "his," but the appeal had been of old a remedy against even the twentieth hand [49] and it was held that by the first taking the property was not out of the appellor and that the appeal lay. For purposes of replevin one from whom goods had been stolen could no longer call the goods "his"; for purposes of appeal he could. But the rule as to the appeal was taken more broadly. It was the accepted law of the Year Books that a theft did not change the "property" in the stolen goods.[50]

A case in trespass in the year following the replevin case is enlightening on trespass as a disseisin.[51] During the course of the argument, Shardelowe, J., said:

"The timber of the house pulled down during the estate of the disseisor is never said to be the chattel of the disseisee, for if you pull down my house and carry off the timber and I bring my writ of trespass, the writ will say *Quare prostravit domum suam, meremium inde asportavit,* and not *meremium suum.*"

To which counsel replied: "Sir, it is true and the cause is this, that the house was yours and the timber from it will be considered yours." This case finds a close parallel [52] a few years later in Professor Ames' other case,[53] where on a bill of trespass brought by the plaintiff for carrying off his horse and killing it,

"the defendant prayed judgment of the bill, since you have confessed the property to be in us at the time of the killing, and so your bill is repugnant; for by the tortious taking, the property was devested out of you and vested in us, and therefore we could not kill our own horse *contra pacem.*" [54]

---

[49] 2 P. & M., 2 ed., 164.

[50] STAUNF. PL. COR. 61 *a*, 188 *a*; FITZ. ABR. COR. 39; BRO. ABR. COR. 171; FINCH, LAW, 210; VINER, ABR. PROPERTY (E 4); COM. DIG. BIENS (E). Pollock and Maitland attempt to explain away the ascription of "property" to the thief. 2 P. & M., 2 ed., 165. The truth of the matter would appear to be that "property" was not ascribed to the thief in the Year Books except in the replevin case quoted above from Professor Ames and possibly in some other rare instance.

[51] Y. B. EDW. III, 2–4. On the point being raised shortly afterwards as to whether trespass for an ouster lay where the plaintiff would have been entitled to an assize, it was after some deliberation allowed. Y. B. (R. S.) 11 & 12 EDW. III, 503–505, 517–519; Y. B 14 EDW. III, 231, cited by Prof. AMES, 3 SELECT ESSAYS, 553 n. 2.

[52] Brian, C. J., argues from a case like the above to cases of trespass where land is not involved. Y. B. 6 HEN. VII, 9–4.

[53] Y. B. 27 ASS., pl. 64.

[54] Trans. AMES, 3 SELECT ESSAYS, 542.

The bill was adjudged bad. The substantial defense of the defendant had been that the horse had been taken *damage feasant*, that it had been put in the pound, that it had jumped the enclosure and then been tied to a post within the pound on which it had killed itself. A new bill was brought in which nothing but the killing was alleged and the plaintiff recovered. It is to be noticed that on the second bill no attempt was made to take advantage of trespass *ab initio*, as would have been done at a later day. That doctrine was still for the future,[55] but the exclusion from the bill or writ in trespass of anything but the charge of taking and asportation must have contributed to the establishment of the general form for trespass *de bonis asportatis* and so helped prepare the way for trespass *ab initio* in cases of distress.

Even in the time of Edward III,[56] as we have seen, the argument of a plaintiff that even although the ore he had dug had come from the defendant's freehold, through having the lead in his hands, the property in it had come to him and the defendant could not lawfully take it away from him, received scant attention.

That the notion of a change of "property" by a theft had

---

[55] The foundation for trespass *ab initio* lay in the fact that from an early day any slip in the complicated code of distress was likely to subject the distrainor to the appeal or trespass (*infra*, p. 391). Something closely akin to it is to be found in Y. B. 5 EDW. II, 134, 135. But to treat it too largely is to ignore the very technical character of the doctrine that has come down to us under that name. In 1410 (Y. B. 11 HEN. IV, 75–16) where the defendant in trespass for a breaking and entering had pleaded an entry to view waste, the plaintiff replied that the defendant had broken in on entering and remained a day and a night. The defendant objected that this matter was not contained in the writ or count and that no response to it was necessary. The objection was not allowed, Hill, J., stating that the subsequent tort would be intended as the cause of the entry, and Hankford, J., that in a like case all would be adjudged tortious. The definite establishment of the doctrine would appear to date from 1431. In a like case in that year (Y. B. 9 HEN. VI, 29–34) Paston, J., urged that the plaintiff should take issue on the intent with which the entry had been made and not allege new matter, but Babington, C. J., held that issue should not be taken on the intention but on whether claim of fee had actually been made which was matter of fact. He was acting on the same principle as Brian, C. J., when the latter said: "It is common learning that the intent of man shall not be tried, for the devil himself doth not know the intent of man" (Y. B. 17 EDW. IV, 2–2). Issue was finally taken on the facts alleged in the plaintiff's replication. Paston advised counsel for the plaintiff to "watch out, for the issue is of novel form." In Edward IV's time the rule of the case had become accepted doctrine (Y. B. 2 EDW. IV, 5–9; 12 EDW. IV, 9–20; 13 EDW. IV, 9–5). In 1482 an entry is said to have become tortious *a principio* (Y. B. 21 EDW. IV, 19–22) and in 1490 we get the modern trespasser *ab initio* (5 HEN. VII, 11*a*–2).

[56] *Supra*, p. 375.

been the peg to hang the decision on rather than the underlying reason for denying replevin against one holding subsequently to the thief is evidenced by the reasons given for denying trespass against the second trespasser. The earliest case in point cited by Brooke [57] is a case of ejectment from wardship,[58] which was an action in the nature of a trespass.[59] It was there said that "if a man ejects another, and then another ejects him, the first who is ejected will not have an action of ejectment against the tenant of the wardship but writ of right." The point was conceded. The guardian in chivalry had a writ of right on which he could fall back,[60] but in the ordinary case of trespass to chattels there was no such writ to which to resort. Nevertheless in this case also trespass was denied against the second trespasser despite the fact that because of the lack of other action to fall back upon the cases were not parallel.[61]

A more satisfying reason for denying trespass against the second trespasser was given by Brian, C. J., himself and his companions. In a charge to the jury he said:

"If one takes my horse *vi et armis* and gives it to S., or S. takes it with force and arms from him who took it from me, in this case S. is not a trespasser to me, nor shall I have trespass against him for the horse, because the possession was out of me by the first taking; then he was not a trespasser to me, and if the truth be so, find the defendant not guilty." [62]

Not except in Brooke's "gloss" is the result ascribed to a change of "property" by the first trespass.[63] And that it was not dependent on change of "property" or even disseisin is shown by the position taken by many of the judges at this time as to the much-mooted question of the right of the disseisee after reëntry to trespass against an intermediate trespasser or one holding under the dis-

[57] ABR. TRES. 256, EJ. CUST. 8.

[58] Y. B. 38 Ass., pl. 9.

[59] See Y. B. 17 & 18 EDW. III (R. S.) 392 and 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 13 n. 5.

[60] As to the right of the guardian in chivalry to a writ of right, see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 13.

[61] The case of ejectment from wardship is a striking confirmation of Pollock and Maitland's general argument as to the significance of the rule denying trespass against the second trespasser. 2 P. & M., 2 ed., 167.

[62] Y. B. 21 EDW. IV, 74–66, trans. AMES, 3 SELECT ESSAYS, 549.

[63] BRO. ABR., TRESP. 358.

seisor. By the reëntry the freehold had revested in the disseisee from the beginning. The peculiar effects of disseisin had been wiped out. Notwithstanding this, Constable, Kingsmil, Frowike, and others in 1498 were of the opinion that even after reëntry the disseisee would not recover in trespass against the feoffee of the disseisor "for two reasons, the one, as aforesaid, he is in by title, the other, the trespass was not made by him but by the first disseisor. And the law is to the same effect where my disseisor is disseised, and I reënter, the second disseisor will not be punished." [64] The views of Brian, C. J., and his companions were applicable to replevin as well as to trespass. Herle, C. J., in the time of Edward II had said that replevin was the most "possessional thing" there was.[65] It was the idea of trespass to property "as an extension of that protection which the law throws around the person" [66] that was uppermost in the minds of Brian, C. J., and his companions and those other judges, of the time of Henry VII, just as it was three centuries and more later to Lord Denman.

The holdings in the above cases seem to have been as good law in 1800 as they were when made. It was still true that replevin did not lie against the "vendee or bailee of a trespasser, nor against a second trespasser"; [67] for the continuous carrying away of trees cut on another's land, a special form of trespass *quare clausum* and not trespass *de bonis asportatis* still lay; [68] in trespass *de bonis asportatis* the taking and carrying away were all that were charged, although the real cause of the action were some subsequent act which now brought into play the doctrine of trespass *ab initio* and trespass did not lie against the second trespasser.[69] In the language of the pleader the property could not have been laid in the plaintiff in these cases as of the time of the subsequent wrong. This language would have had a familiar sound to Herle, C. J., and it is doubtful whether he would have given a very much wider scope to its meaning than his modern successor. At least we know that when one attempt was made to carry it beyond the law of ac-

[64] Y. B. 13 HEN. VII, 15–11. There was a conflict on this point. See AMES, LECTURES ON LEGAL HISTORY, 230; also STEARNS, REAL ACTIONS, 416 n.

[65] Y. B. 3 & 4 EDW. II (S. S.) 72.

[66] Rogers *v.* Spence, 13 M. & W. 571, 581 (1844), cited 2 P. & M., 2 ed., 42.

[67] Ames, 3 SELECT ESSAYS, 554, citing Mennie *v.* Blake, 6 E. & B. 847 (1856).

[68] POLLOCK & WRIGHT, POSSESSION, 230.

[69] *Ibid.*, 151.

tions and into the general law of property he made a vigorous protest.[70]

But however far the judges of the time of Edward III might have been willing to go in applying disseisin to chattels, to whatever extent they were ready to ascribe "property" to trespassers or thieves, most of their successors in the following century saw in the ascription of "property" to the trespasser not disseisin but disseisin by election,[71] and disseisin by election was purely remedial.[72] To them it was the proceedings in trespass rather than the trespass itself that divested the property, and the proceedings in trespass had this effect because they were for damages alone and therefore involved a waiver of the right to the property itself.

Disseisin by election appears in an action of trespass brought in 1440 for the taking of a horse and other goods and chattels.[73] The defendant pleaded that the plaintiff had taken his grain and that he had taken the horse *damage feasant* to the grain. It was objected that the defendant had shown by his plea that the property in the grain was out of him at the time of the taking of the horse. To this Newton, C. J., replied:

"If you had taken my chattels it is at my wish to sue a replevin, which proves that the property is in me, or to sue a writ of trespass, which proves that the property is his who took them and so it is at my wish to waive the property or not. So here, he has not waived the property for he has justified for *damage feasant* in the said grain."

Markham insisted that a new possession was necessary before the distraint. To which Newton said:

"Suppose that you take my goods in A. and carry them to B. and then from B. to C., by your taking in A. the property is out of me and still I will have a good action of trespass of the taking from B. to C., which proves that the property is in me at my wish."

In 1462 [74] Danby, C. J., used the same reasoning based on the concurrence of replevin with trespass in denying the point made by

[70] *Supra*, p. 380.

[71] AMES, 3 SELECT ESSAYS, 553.

[72] "A disseisin by election was not the foundation of rights in the disseisor; it did not operate at all to the prejudice of the person who elected to be disseised, but on the contrary, afforded him a convenient remedy through which to enforce his rights." 3 GRAY, CASES ON PROPERTY, 2 ed., 34 n.

[73] Y. B. 19 HEN. VI, 65–5. See also AMES, 3 SELECT ESSAYS, 553.

[74] Y. B. 2 EDW. IV, 16–8.

Littleton, who was then of counsel, that a gift by a bailor to one who had taken the chattel from the bailee was void. Danby's remarks were in support of Needham, J., to whose statement Littleton had taken exception.

Disseisin by election was expressly invoked by Vavasor, J., in a similar case in 1495. He said:

"Although one take the possession from me, still he is not able to take my property from me, for it is proved that my property remains for I will have replevin which proves the property entirely in me, for if he wishes to claim property it will be found against him and with me. And so, if he was able to have this by the taking, then I would receive nothing by replevin against him. And so one is able to bring writ of detinue, which proves that the property is not out of him if he does not wish it, but he may if he wishes, bring action of trespass, for he is able to be out of the property if he wishes, as one is able to be disseised of rent if he wishes by bringing the assize, but it is at his wish. And so it is of goods taken. One can divest the property out of himself, if he wishes by bringing action of trespass, or demand property by replevin or writ of detinue." [75]

To this Brian, C. J., did not agree. He admitted that neither the bailment nor the trover in detinue were traversable, but said that detinue would lie only where the defendant came by the goods loyally and allowed replevin but on the ground that it was of property which the plaintiff had at the time of the taking. But as early as 1358 it had been held that a plaintiff might have replevin though it was only by bringing the action that the property was vested in him, so that he had not had the property before the time of action brought; [76] and if replevin had not at least assumed property in the plaintiff at the time of action brought, there would not have been that "contrairiositie" [77] in the supposal of the writs of replevin and trespass emphasized in the Year Books and noted by Professor Ames. It was in this connection that Brian made the statement which Professor Ames has made his text:

"And so in my opinion the property is divested by the taking, and then he has nothing but a right of property, and so the property and the right of property is not all one."

[75] Y. B. 6 HEN. VII, 8–4.

[76] FITZ. ABR., REPLEVIN, 43. See Co. LITT. 145 *b*.

[77] AMES, 3 SELECT ESSAYS, 551, citing the Year Books. See especially the statement by Newton, Y. B. 8 HEN. VI, 27–17, which precedes the case in 1440 for the taking of the horse *damage feasant* by some eleven years.

The contrast between replevin and detinue on the one hand and trespass on the other was not new. The former were recuperatory, the latter was not, and so they seem to have survived to the executor from the first while trespass was denied until in 1330 a statute allowed the executor to bring trespass for goods carried away in the lifetime of his testator.[78] The importance of this recuperatory element in the notion that replevin affirmed property in the plaintiff may be seen from what was said in 1489 [79] as to the appeal of felony. On an indictment for larceny the defendant pleaded that he had been acquitted of the same felony in another county. To Hussey, C. J., this seemed no plea.

"And as I understand, trespass for battery committed in one county cannot be found in another county on pain of attaint; and the same law of goods taken and carried out of the county where they were taken, it can only be found in the county where the taking occurred, and that on pain of attaint. But the law is otherwise in appeal; for there he may bring an appeal in each county where the goods are carried. And this has been a diversity, for the appeal is to recover his goods, and affirms property continually in the party, etc., but it is otherwise of trespass; for it is not to recover the goods but damages for the goods, etc. And, sir, I take it, if one steals my goods, and another steals the goods from him, I shall have an appeal against the second felon; but it is otherwise of trespass. And notwithstanding the appeal lies in each county where the goods are carried, still he cannot be indicted except where the taking was made, for the indictment is not to have the goods, etc.; and that has been the diversity between indictment and appeal." [80]

To this diversity between appeal, indictment, and trespass, Fairfax, J., agreed.

Aside from the relief afforded, there was another respect in which replevin at one time differed from trespass, and that was in the wrongs which they remedied. Replevin was originally a proceeding in case of distraint and remained primarily such to recent times. On the other hand the use of trespass in cases of distress was distinctly limited. To Professor Ames "trespass and replevin were thus fundamentally distinct and mutually exclusive actions. The one was brought against a disseisor; the other against a cus-

[78] See AMES, 3 SELECT ESSAYS, 557, 581.

[79] Y. B. 4 HEN. VII, 5–1; BEALE, CASES ON CRIMINAL LAW, 820.

[80] Trans. BEALE.

todian." [81] If trespass for an asportation was so pronouncedly an action against a disseisor, then there is ground for arguing that there was a strong analogy between it and the assize, and as trespass to land would not at first lie for a disseisin, for arguing that trespass for an asportation had more in common with the assize than it did with trespass to land. Professor Ames goes to that length, making trespass to land and replevin analogous and setting them over against the assize, trespass for an asportation, and the appeals.[82] But any theory that would make trespass to land and trespass to chattels fundamentally distinct would destroy an analogy much in use throughout the Year Books and after and substitute in its place one that at best early disappeared.

The wrongs charged in the writs of trespass *de bonis asportatis* and replevin differed in that in the former it was a taking and carrying away *vi et armis* and against the peace of the king that was charged, while in the latter it was a taking and unjust detention. In the count the detention is specified as one against gage and pledge.[83] This was the count in the *vee de nam* in Bracton's time and he tells us that it happened frequently that the lord might safely deny the detention against gage and pledge, but not the unjust seizure, whereupon both were in mercy.[84] In the time of Edward I, it is said [85] that the defendant still ought to respond to the detinue as well as to the taking, but although the like opinion was held by some in a case in the fifth year of Edward II the plea of the defendant to the taking of the beasts was received without his responding to the detinue.[86] Damages might still be given, however, where the taking was lawful but the detention tortious,[87] until finally where there was nothing but the tortious detention, the plaintiff was forced to resort to detinue.[88] The *vi*

---

[81] 3 SELECT ESSAYS, 551.

[82] *Ibid.*, 553 n. 2, 425–427. See also AMES, LECTURES ON LEGAL HISTORY, Lecture XIX. On page 228 he says: "It is to be remembered that trespass *quare clausum fregit* is not a counterpart to trespass *de bonis asportatis*. Assize of novel disseisin corresponds to the latter action. The modern trespass or case for injury to chattels corresponds to trespass *quare clausum fregit*."

[83] MARTIN, CIVIL PROCEDURE, 374.

[84] BRACT. 156 *b*.

[85] FITZ. ABR., REPLEVIN, 27.

[86] Y. B. 5 EDW. II, 157; FITZ. ABR., REPLEVIN, 21.

[87] F. N. B. 69 G.

[88] See 33 HEN. VI, 26–12 and F. N. B. 69 G. n. (*a*).

et armis of the writ of trespass seem to have already become words of form in 4 Edward II,[89] while the surviving function of the *contra pacem* was to affect the charge with a tinge of criminality.[90] In effect, in the early years of Edward II the charge in each of the two actions had been narrowed down to an unlawful taking, and at that time we find replevin and trespass on the Statute of Marlborough for driving the cattle distrained out of the county treated as concurrent actions.[91]

So far indeed were the judges of the Year Books from feeling that trespass was not on principle an action to be used in case of a distress, that it was accepted doctrine that prior to the Statute of Marlborough [92] trespass *vi et armis* had lain against the lord who had distrained when rent was not in arrear.[93] This also was the understanding of Coke.[94] Their history may have been at fault,[95] for trespass *vi et armis* was just becoming a writ of course about the time the Statute of Marlborough was passed, but the important point for us is that they saw nothing on principle to prevent the use of trespass *vi et armis* in such a case. They gave a narrow construction to the statute and allowed trespass against the lord's bailiff.[96]

That replevin lay for a trespass was, as we have seen, the stock argument of the judges of the 1400's to show that a trespass was nothing more than a disseisin by election. Brian, C. J.'s argument against disseisin by election would have been so much more effective if he could have denied the concurrence of replevin with trespass as he did of detinue. He made no such attempt, notwithstanding, as it would seem, that they were not concurrent in practice.[97] If they had ever been "fundamentally distinct and mutually exclusive actions" it is hard to see how he could have recog-

[89] Y. B. 3 & 4 EDW. II (S. S.) 29.

[90] 2 P. & M., 2 ed., 464.

[91] Y. B. 5 EDW. II, 134, 135.

[92] C. 3.

[93] 44 EDW. III, 20–16; 11 HEN. IV, 78–19; 10 EDW. IV, 7–18; 9 HEN. VII, 4–4, 14–8. That statute had provided that the lord should not be fined in such a case and as a fine was incident to trespass *vi et armis*, the latter was impliedly excluded. See CO. LITT. 127 *a*.

[94] 2 INST. 105; Bevil's Case, 4 Co. 11 *b* (1583).

[95] But see *infra*, p. 391, and the cases cited by Maitland, 3 HARV. L. REV. 167.

[96] See the citations in the preceding notes.

[97] AMES, 3 SELECT ESSAYS, 431, 553 n. 2.

nized them as "theoretically" concurrent. The writ *de proprietate probanda* had removed the objection that replevin could be defeated by a claim of property before the sheriff, but this had not been responsible for such change in attitude as to "property" in the trespasser as there may have been in the judges of the time of Edward III and the judges of the 1400's, for it had been instituted at least as early as the time of Edward II [98] and its object seems to have been not so much to extend the scope of replevin as to make replevin more effective by keeping down false claims of property. When we get the first expression of the concurrence of replevin with trespass *contra pacem*, that by Gascoigne, C. J., in 1405,[99] the writ *de proprietate probanda* is resorted to by way of argument to show that replevin was not concurrent with trespass in that where the property was found for the defendant at the sheriff's inquest, the replevin proceedings were at an end. In practice replevin was regarded as a proceeding to settle disputes between landlords and tenants, or more broadly between distrainors and distrainees, but fundamentally the judges did not see why it might not be used generally in cases of trespass. In its early stages it could have been defeated by a claim of property just as trespass to land could have been defeated by a claim of freehold, but any distinction between actions based on the intention with which similar acts were done was likely to have short life in the Middle Ages, and it did in these cases. The anomalous character of the proceedings in replevin by which the sheriff handed over the property on mere complaint and before trial, gave occasion for the writ *de proprietate probanda*, and this writ helped to keep the fact of the old difference between replevin and trespass alive. But if they were ever fundamentally distinct it is hard to account for the unanimity of opinion in their "theoretical" concurrence in the later 1400's.

But not only would it seem that replevin and trespass were not fundamentally distinct and exclusive but that their relationship from the first was of the most intimate kind. Both were intimately connected with the appeal of robbery. A *vee de nam* was said to be "a kind of robbery against the peace of the king even more than a novel disseisin," [100] while Littleton [101] and Choke [102] could

[98] *Supra*, p. 376.

[99] Y. B. 7 HEN. IV, 28*b*–5; AMES, LECTURES ON LEGAL HISTORY, 69.

[100] BRACT. (Twiss), 157 *b*; 2 P. & M. 577.

[101] Y. B. 2 EDW. IV, 15–7.

[102] Y. B. 9 EDW. IV, 33–9.

argue from the appeal to trespass. In early counts in appeal [103] and trespass [104] we find the allegation that has come down to us through replevin from the *vee de nam* that the defendant had detained chattels against gage and pledge. In the first chapter of the Statute of Marlborough "distresses" and "revenges" are put under the like interdict, as trespasses, and it is only through the exception made in the third chapter that the lord escaped this general interdict. Even he was subject to the general fine if he distrained out of his fee [105] or drove the distress out of the county.[106] The legality of extra-judicial distress does not appear to have been ancient.[107] In the time of which Pollock and Maitland wrote, "the distrainor who did not observe all the complex rules of the code of distress was lucky if he extricated his neck from the noose," [108] and this is reflected in the trespass *ab initio* of later days. There was no such intimate connection between detinue and trespass, and one subject to an action of detinue did not become a trespasser *ab initio* by a subsequent misdemeanor.

It is a significant fact that in the discovery of "the seisin of chattels" [109] replevin and theft played a conspicuous part. In his presentation of the matter, Maitland was forced to rely for the most part on replevin cases [110] in which the phrase "still seised" did not finally give way to "still detained" until the reign of Henry VI.[111] As long as the defendant in replevin was "still seised" the plaintiff did not have to reply to the avowry,[112] and this rule *et seisiatus placitet* is found as far back as the laws of Henry I.[113] "It is said that German law without foreign help got as far as this" in the protection of possession [114] and we have already seen Herle's statement that replevin was the "most possessional thing" there was.[115] And the technical phrase running back to the Laws of

[103] SEL. PL. CR. (S. S.), pl. 138; 2 ROT. CUR. REG. 230.
[104] Maitland, "Register of Original Writs," 3 HARV. L. REV. 167.
[105] C. 2. [106] C. 4.
[107] 2 P. & M., 2 ed., 576; BIGELOW, HIST. PROC., 208.
[108] 2 P. & M., 2 ed., 499.
[109] Maitland, 1 LAW QUART. REV. 324.
[110] 1 LAW QUART. REV. 325.
[111] *Ibid.*, 330.
[112] Maitland, 1 LAW QUART. REV. 327, 328, citing Y. B. 21 & 22 EDW. I (S. S.) 10, 56.
[113] C. 29, § 2; 1 LAW QUART. REV. 325.
[114] 2 P. & M., 2 ed., 47. [115] *Supra*, p. 384.

Henry I was *de furto seisiatus*.[116] It was a "question of life and death whether the thief was taken in seisin of the stolen goods." [117] It seems likely that to a lawyer of the time of Edward I "disseisin of chattels" would sooner have suggested theft or the proceedings in replevin than trespass. Any unlawful ouster from land, it would seem, would from the first have subjected a man to the assize. The claim of freehold was important where the act was less than ouster and so of doubtful import.[118] Likewise it would seem that any unlawful taking of a chattel would have been considered a disseisin whether under claim of property or not.

Whatever analogy there may have been between the assize and trespass for an asportation and the appeal, it was not an active one in the Year Books. It did not result in trespass being used against the second trespasser [119] nor for a tortious transfer by the bailee,[120] and far from allowing the appeal against the second thief on analogy to the assize, it was put on the ground that the property had not been changed by the first theft.[121] On the other hand, the analogy between trespass to chattels and trespass to land was most active, and there is strong reason for thinking that so much of disseisin as drifted through to trespass for an asportation did so by way of trespass for a disseisin of land.[122] In the early examples of trespass *quare vi et armis* the destruction or asportation of goods is generally complained of as an incident to trespass to land[123] and it was only slowly that the subforms of the general action developed.[124] The development of these subforms does not appear to have gone very far in the reign of Edward III.[125]

Viewed either as a commentary on the "his" of the writs of replevin and trespass or as another way of stating that one waived the property in a chattel by proceeding in trespass, the notion that

---

[116] 1 LAW QUART. REV. 325.

[117] *Ibid.*, 326.

[118] If an act less than an ouster was done a second time, the assize held notwithstanding a disclaimer of freehold by the defendant. 1 BRITT. (NICHOLS), 343; BRACT. 216 *b*.

[119] As to the failure of the analogy in this respect, see especially 2 P. & M., 2 ed., 168 n. 2.

[120] See AMES, 3 SELECT ESSAYS, 550.

[121] *Supra*, p. 380–1.

[122] *Supra*, p. 381, and see 2 P. & M., 2 ed., 167.

[123] 2 P. & M., 2 ed., 166.

[124] *Ibid.*

[125] Y. B. 20 EDW. III (R. S.) XXXVIII.

the "property" in a chattel could be changed by a trespass would seem to have been neither fundamental nor old. That it had what vogue it had with the glossators of the Year Books would appear to have been due partly to the great authority of whatever came from Brian, C. J., but principally to the contrast made between felony and trespass in proceedings against the third hand.[126] It had early been held that a taking by way of distress did not alter the "property" in the goods,[127] and this was re-affirmed in the year preceding the case against the second felon.[128] The distrainor did not claim property in the distress but took it as security for the performance of some obligation. When the argument was made that the property had been altered by the first theft, the case of distress evidently presented itself and the same point was made as to the thief that he does not claim property. He does claim property in the accepted sense in which that phrase is used in connection with disseisin,[129] but evidently it was not disseisin that the judges had in mind. We now say that a taking is not a theft if it is under *bonâ fide* claim of right.[130] A taking under a dispute as to title is not felonious. It was this that the judges had in mind and they were laying down a valid distinction between larceny and trespass when they said that "a felon does not claim property" however far removed this may have been from disseisin.

The contrast between felony and trespass is brought out in Fitzherbert's report of the case by the addition, after the words "for felony does not claim property," of "otherwise is it of trespass." [131] A like diversity between trespass and the appeal is emphasized in the case from 1489 already quoted.[132] In the latter case the procedural character of the contrast is evident. Fitzherbert's addition seems to be an assertion that trespass claims property and not necessarily that it alters it, but Brooke gives the latter explanation of the case against the second trespasser,[133] while Finch ex-

[126] FITZ. ABR., COR. 39; Y. B. 13 EDW. IV, 3–7; Y. B. 4 HEN. VII, 5–1; *supra*, p. 380.

[127] FITZ. ABR., REPLEVIN, 43.

[128] Y. B. 12 EDW. IV, 10–25.

[129] AMES, 3 SELECT ESSAYS, 426.

[130] 2 BISHOP, NEW CRIMINAL LAW, § 851.

[131] ABR. COR. 39. Compare this with the "it is otherwise if he who took the beasts claimed the property" of the case of distress referred to *supra*, p. 379.

[132] *Supra*, p. 387.

[133] BRO. ABR., TRESP. 358; *supra*, p. 383.

plains Professor Ames' case where the defendant was charged with carrying off the plaintiff's horse and killing it [134] by the "pretence of title" attributed to the trespasser in this case against the second thief.[135] The statement made by Finch, however, was of the broadest kind,[136] and in this he was followed by Viner.[137]

"And so we arrive at this lamentable result which prevails for awhile: If my chattel be taken from me by another wrongfully but not feloniously, then I can have no action against any third person who at a subsequent time possesses it or meddles with it; my one and only action is an action of trespass against the original taker. A lamentable result we call this, not so much because it may have done some injustice to men who are long since dead and buried, as because for centuries it bewildered our lawyers, made them ascribe 'property' to trespassers and even to thieves, and entailed upon us a confused vocabulary, from the evil effects of which we are but slowly freeing ourselves." [138]

Percy Bordwell.

STATE UNIVERSITY OF IOWA.

[134] *Supra*, p. 381.
[135] FINCH, LAW, 199.
[136] *Ibid.*, 199, 210.
[137] ABR. PROP. (E. 4).
[138] 2 P. & M., 2 ed., 167.